

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 20, 2008

STATE OF TENNESSEE v. WILLIAM MICHAEL CLARK

**Direct Appeal from the Criminal Court for Davidson County
No. 2005-C-2114 Monte Watkins, Judge**

No. M2007-00904-CCA-R3-CD - Filed March 31, 2008

The appellant, William Michael Clark, pled guilty in the Davidson County Criminal Court to attempted rape of a child, attempted aggravated sexual battery, and sexual battery. The trial court imposed a total effective sentence of twelve years and ordered the appellant to serve one year of his sentence in confinement and the remainder on probation. On appeal, the appellant challenges the trial court's failure to grant full probation. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Mark C. Scruggs, Nashville, Tennessee, for the appellant, William Michael Clark.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Hugh Garrett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In July 2005, the Davidson County Grand Jury returned a multi-count indictment charging the appellant with two counts of rape of a child, four counts of aggravated sexual battery, and three counts of statutory rape, all involving the victim, D.Q.¹ Ultimately, the appellant pled guilty to one count of attempted rape of a child, with a sentence of ten years; one count of attempted aggravated sexual battery, with a sentence of six years; and one count of sexual battery, with a sentence of two years. The plea agreement provided that the sentence on count one, aggravated sexual battery was

¹ It is the policy of this court to refer to minor victims of sexual abuse only by their initials.

to be served concurrently with the sentence on count four, attempted rape of a child. The sentence for sexual battery was to be served consecutively to counts one and four, for a total effective sentence of twelve years. However, the manner of service of the sentence was to be determined by the trial court.

At the appellant's sentencing hearing, the appellant testified that he was fifty-three years old and had a master's degree in business administration from the University of Tennessee. He said that he worked in healthcare management, earning a base salary of \$120,000 plus bonuses. Initially, the victim's father was a business acquaintance, but the two men became friends. The appellant socialized with the victim's family. The appellant said that he met the thirteen-year-old victim at his bar mitzvah in 2001. From 2001 until 2005, the appellant took the victim to dinner and on several trips, paying for the outings.

The appellant said that he and the victim began a sexual relationship that lasted a span of four years. The appellant said that there was "nothing contrived" about his relationship with the victim. The appellant stated that he did not coerce or force the victim into a sexual relationship; instead, he believed that the sexual relationship was "consensual." The victim told the appellant that he had previously had relationships with other boys, and the appellant said the sexual relationship "evolved from there."

The appellant said, "I loved [the victim]. I thought he was, you know, a lot of fun. I mean, it wasn't simply just let's go have sex and I'll see you, hi and bye. I mean, there was a lot more to it than that." He admitted that he tried to keep his relationship with the victim secret. The appellant said that he was not responsible for the victim's homosexuality, maintaining that he was not "responsible for creating what he is today . . . [or for] the lifestyle that he has chosen."

The appellant opined that he was not a danger to children, but he acknowledged that he needed treatment for his problems. He said that he had pursued treatment options at two facilities.

The appellant conceded that he had a previous criminal history consisting of one theft conviction and one conviction for driving while impaired. The appellant maintained that the theft conviction was a result of bad checks, and the driving while impaired conviction was the result of ingesting cough syrup.

Upon cross-examination, the appellant denied, contrary to the results of multiple psychosexual evaluations, that he minimized his role in the crimes. He said that he knew his relationship with the victim was wrong. He also maintained that he was remorseful and that he had admitted responsibility for his actions. The appellant acknowledged that the victim had filed a civil lawsuit against him and that he had agreed to pay the victim \$250,000 over a period of time. The appellant said that he had already paid the victim \$30,000. The appellant maintained that he could not continue to make restitution if incarcerated.

As exhibits, the State submitted the presentence report, three psychosexual evaluations of the appellant, and victim impact statements of the victim and his mother. In the victim impact statements, the victim and his mother recounted how the appellant's offenses have devastated the family. The victim stated that he has nightmares about the offenses. He is afraid to get close to people, and his memories of the offenses can be triggered by words or actions. The victim said that he has lost his confidence in himself and his trust in people. The victim's mother stated that the victim "was forced to discover his sexuality at an inappropriate age of 9." She stated that the family had been devastated by the appellant's action. She explained that since learning of the offenses, the victim's father had twice attempted suicide and was unemployed for almost four years because of depression and alcoholism. Additionally, the family had lost their savings and had been forced to move out of the state.

At the conclusion of the sentencing hearing, the trial court noted that the appellant's psychological reports were "surprisingly consistent," reflecting that the appellant "always wants to put himself in the best light." The trial court also considered the appellant's prior criminal history and the victim impact statements. Clearly, the trial court was concerned about the likelihood that if the appellant were incarcerated, the victim would likely not receive further restitution. The trial court noted that although the victim and his mother wanted the appellant punished "to the full extent of the law," both were concerned about the financial hardship inflicted upon the family as a result of the appellant's actions. The court observed that the appellant committed acts he knew were wrong over an extended period of time. In order to "help both sides," the trial court ordered the appellant to serve one year of his sentence in confinement with the remaining eleven years on probation. On appeal, the appellant challenges the trial court's denial of full probation.

II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the defendant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence(s). See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

A defendant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann.

§ 40-35-102(6).² In the instant case, the appellant is a standard Range I offender convicted of a Class B felony; therefore, he is not presumed to be a favorable candidate for alternative sentencing. However, a defendant is eligible for alternative sentencing if the sentence actually imposed is eight years or less. See Tenn. Code Ann. § 40-35-303(a).³ Each of the appellant's individual sentences meet this criteria; therefore, he is eligible for probation. See id., Sentencing Commission Comments.

Under the 1989 Sentencing Act, sentences which involve confinement are to be based on the following considerations contained in Tennessee Code Annotated section 40-35-103(1):

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. See Tenn. Code Ann. § 40-35-103(5).

A defendant seeking full probation bears the burden of establishing his suitability for full probation, regardless of whether he is entitled to the statutory presumption favoring alternative sentencing. See State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996); see also Tenn. Code Ann. § 40-35-303(b). To prove his suitability, a defendant must establish that granting full probation will “subserve the ends of justice and the best interest of both the public and the [appellant].” State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 8 (Tenn. 2000). Moreover,

[i]n determining one's suitability for full probation, the court may consider the circumstances of the offense, the defendant's potential or lack of potential for rehabilitation, whether full probation will unduly depreciate the seriousness of the offense, and whether a

² As of June 7, 2005, Tennessee Code Annotated section 40-35-102(6) provides that certain offenders “should be considered” favorable candidates for alternative sentencing instead of being presumed favorable candidates for alternative sentencing. However, this change was made after the instant offenses were committed.

³ As of June 7, 2005, Tennessee Code Annotated section 40-35-303(a) provides that a defendant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. However, this change was made after the instant offenses were committed.

sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes.

Boggs, 932 S.W.2d at 477.

As we previously noted, one of the considerations in our de novo review is the nature and characteristics of the criminal conduct involved. However, the appellant has failed to include the transcript of the guilty plea hearing in the record for our review. This court has previously noted,

For those defendants who plead guilty, the guilty plea hearing is the equivalent of trial, in that it allows the State the opportunity to present the facts underlying the offense. For this reason, a transcript of the guilty plea hearing is often (if not always) needed in order to conduct a proper review of the sentence imposed.

State v. Keen, 996 S.W.2d 842, 843 (Tenn. Crim. App. 1999) (citation omitted). The appellant's failure to include the transcript of the guilty plea hearing in the record precludes this court from conducting a full de novo review of the sentence under Tennessee Code Annotated section 40-35-210(b). See State v. Bennett, 798 S.W.2d 783, 789 (Tenn. Crim. App. 1990); State v. Shatha Litisser Jones, No. W2002-02697-CCA-R3-CD, 2003 WL 21644345, at *3 (Tenn. Crim. App. at Jackson, July 14, 2003). Moreover, we note that the appellant failed to include the psychological reports which were considered by the trial court. See Tenn. R. App. P. 24(b) (providing that the appellant carries the burden of ensuring that the record on appeal conveys a fair, accurate, and complete account of what has transpired with respect to those issues that are the bases of appeal). Regardless, from the testimony at the sentencing hearing, we conclude that the trial court did not err in denying the appellant full probation.

The trial court observed that the appellant sexually abused the victim over a span of years. The proof at the sentencing hearing reflected that the appellant cultivated a relationship with the victim and his family, and he used that relationship to sexually abuse the victim. Additionally, the victim impact statements reveal that the victim and his family were emotionally devastated by the appellant's actions. However, the appellant continued to downplay the impact of his behavior on the victim. The trial court concluded that the nature and circumstances of the offenses outweighed any positive factors favoring full probation. We agree with the trial court and conclude that the foregoing circumstances were sufficiently egregious to warrant a denial of full probation. See State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999); State v. Randy Leming, No. 03C01-9709-CC-00426, 1998 WL 397367, at *7 (Tenn. Crim. App. at Knoxville, July 16, 1998).

III. Conclusion

Finding no error, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE